Development of Law pertaining to Arbitration and Its Impact on minimizing Role of Courts: A Critical Study

SHORT SYNOPSIS

Submitted in partial fulfilment of the requirement of the degree of

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by

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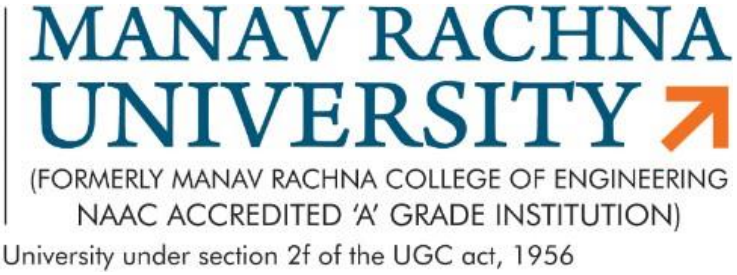

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Abstract

Alternative Dispute resolution as the name suggests that it is substitute of traditional court system. The main objective of this method is to give speedy, easy, swift and handy justice. Alternate Dispute method is the Non-Judicial approach in which dispute is solved out of the court. It is also complementary to courts. Arbitration is the process in which dispute is solved by appointed private judge and judgement is binding on disputed parties and judge is impartial. There was dire need of alternative to adversarial court method. In other words Arbitration and Conciliation Act 1996 has taken birth for resolving the dispute but it was not satisfy the need. For reducing the burden of the courts and proving swift justice to people Arbitration and Conciliation Act 1996 was amended and Arbitration and Conciliation Amendment act 2015 was passed but this act also not achieve the objective of arbitration and conciliation in India.

Introduction

In India arbitration hub is recently promoted by the Indian Lawmakers and the changes is brought by the Arbitration and conciliation act 1996. The main objective of this act is to provide speedy and efficient justice through arbitration. In India various arbitration institutions are established especially in last five years. This system made tremendously change on the economic sector of India and also on global perception on "doing business" in India.[1]. Arbitration is long tradition in India. In ancient India dispute is settled by tribunals which is chosen by the parties. During British era arbitration is recognised and encouraged by the Bengal regulations of 1772, 1780, 1781 and Cornwallis regulations of 1787. Therefore prior to the enforcement of Arbitration and Conciliation Act 1996 the Indian arbitration law is contained in three enactments the 1937 Act, 1940 Act and the 1961 Act.[2] For the enforcement of foreign awards a separate law is made i.e. Foreign Awards Act 1961 because 1941 Act did not deal with the enforcement. The Arbitration and Conciliation Act, 1996 has been drafted on the basis of UNICTRAL model. The earlier Acts of 1937, 1940 and 1961 were repealed. The working of this Act has also not been satisfactory. Report of Law Commission of 2001, Report of Law Commission of 2014 reported various shortcomings and practical problems in this Act. Therefore several amendments were made in the Act during 2015.[3]

Literature review

Justice SB Malik, Commentary on the Arbitration and Conciliation Act (Universal Law, 2017) This book includes all the laws relating to arbitration and conciliation. The book contains all the Supreme Court judgments until 2017 on Arbitration.

Dharmendra Rautrey, Principles of Law of Arbitration in India (Wolters Kluwer, 2018) This book deals with the principles of Arbitration law in India. It clarifies the stages of arbitration proceeding, which may be used by the lawyers representing the parties in

[1](Shodhganga.inflibnet.ac.in,2019)<https://shodhganga.inflibnet.ac.in/bitstream/10603/180576/16/16_chapter%207%20conclusion%20and%20suggestions.pdf> accessed on 13 October 2019.

[2] (Lawcommissionofindia.nic.in, 2019) <http://lawcommissionofindia.nic.in/reports/Report246.pdf> accessed on 13 October 2019.

[3] 'An Insight Into 2015 Amendment Act And 2018 Amendment Bill Arbitration Act, 1996' (Legalserviceindia.com, 2019) <http://www.legalserviceindia.com/legal/article-200-an-insight-into-2015-amendment-act-and-2018-amendment-bill-arbitration-and-conciliation-act-1996.html> accessed on 13 October 2019.

arbitration proceedings. Along with the stages, it also includes the case laws which is given by different courts in the country.

OUP India and Shashank Garg, Alternate Dispute Resolution (OUP India, 2018) ADR is the method in which two parties can resolve their dispute outside the courts through arbitration, conciliation and negotiation methods. With the rapidly increased in the business in India, the demand for the ADR system is also increased and this book includes all the contemporary aspects of the arbitration. It addresses the issues that have emerged with the amendment of the Arbitration and Conciliation act 2015.

R.S. Bachwat, Anirudh Wadhwa, Anirudh Krishnan (Eds.), ***Law of Arbitration and Conciliation*** **(Lexis Nexis, 2017)**

This book contains all the provisions of the international commercial arbitrations and foreign awards. It explains Model law, UNCITRAL Notes, Comments. It also includes the history of arbitration.

Dr. Anupam Kurlwal, ***An Introduction to Alternate Dispute Resolution System*** **(Center Law publications 2017)**

This book is a complete textbook of the ADR system which covers all the important topics. The literature has been thoroughly updated and also draws important amendments to the Arbitration and Conciliation Act 2015. The authors also laid down the important judgments of the High Court and Supreme Court on the Arbitration and Conciliation Act 1996.

Archit Sehgal "An Insight into 2015 Amendments Act and 2018 Amendment Bill Arbitration and Conciliation Act, 1996"

This article deals with the 2015 Amendments and also laid down the 2018 bill. It indicates the shortcoming in Amendment Act 2015.

Lomesh K.Nidumuri "India: Critical Analysis of the Arbitration and Conciliation (Amendment) Act, 2015"

This article discusses the Amendment 2015. This Amendment is the most important step in saving the cost and time which is biggest curse in the Indian arbitration. This is also failed and did not result in cultivating the culture of arbitration in India.

Bibek Debroy and Suparna Jain "Strengthening Arbitration and its Enforcement in India"

This Article contained all the data of the Indian Arbitration courts. This also contained the data of Delhi HC and Apex Court judges and how many cases are pending in the courts. The courts are overburden due to the non-availability of the judges.

Context of the Study

In case of *Guru Nanak Foundation v. Rattan Singh & Sons* Supreme Court made observations "Interminable, time consuming, expensive court procedure prompted jurists to explore for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap."

Food Corporation Of India v. *Hari Prasad Kanoria & Others*[4] Apex Court examined "We should make the law of arbitration simple, less technical and more accountable to the actual realties of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done." [5]

It is estimated that 31 million cases are pending in various courts of India, in which 59272 cases are pending in Supreme Court of India, 83 lakh cases are pending in HC of India and 270 lakh cases are pending in other courts of India. It is calculated that 12 million cases are awaited trial in Indian courts. The pendency of the cases list is also very high. In India total 32,656 civil suits are pending before the five High Courts with original jurisdiction in Bombay, Calcutta, Delhi, Madras, and Himachal Pradesh. Further the big issue which is faced by Indian judiciary is vacancies of judges. On 2016, 19.35% seats are vacant in the

[4] 'Food Corporation Of India V. Chandu Construction And Another | Apex court Of India | Judgment | Law Casemine' (Casemine.com, 2019) <https://www.casemine.com/judgement/in/5609ae56e4b01497114137d8> accessed on 18 October 2019.
[5] R. S. , C. S. P., Aruneshwar Jindal Sastry Gupta, Supreme Court On Arbitration And Contracts: An Exhaustive Topical Referencer ... (2015).

Supreme Courts, 42.45% in High Courts and 23.19% in subordinate courts. It is calculated further that the number of judges are also less than per million populations compared with the developed economies. Many litigants feel that after the amendments there are uncertainties, inflexibilities and technicalities in this act. People also find that arbitration method is so expensive, time consuming and distressing. In California arbitration panel are arranged and they are attached with the courts but in India there is no panel of arbitration is maintained that can work at at lower levels in consultation with courts. Arbitrators training is also not given to especially those who have not any judicial background and due to this the awards they passed can withstand judicial scrutiny.[6] Further many projects are not completed on time which is agreed by the parties and due to this delay in completing the project. The delays in project give rise to dispute between the parties and project is not finished till a dispute is resolved. The funds are locked, loss to the government and corporate. There is no mechanism for disallowing arbitrators who take much time to give awards. There is also no mechanism to see the expertise of arbitrators. The time rigidity is also another issue in which disputes is resolved by the arbitrator within one year and for the extension of timeline parties are compelled to approach to courts to seek extension. [7] There is proposal for amendment in the current Act and Amendment Bill 2009 is being considered. However in this also there is no clear definition of the scope, role and powers of the arbitrators. There are also no clear directions or provisions on the issue when two Indian parties can engage foreign seat when they are bound by the Indian law of Arbitration. Section 42A containing confidentiality is also not clear.[8]

The Arbitration and conciliation Amendment Act 2015 brought various changes and help the nations in supporting in international arbitration. Through this act parties are able to make E-Contract and also included a model fee schedule of tribunals and arbitrators. The time period for resolving the dispute is also fixed of a one year time limit and this time can be extended with the consent of the parties but not more than six months. It is interested that fees of arbitrator is also incentivised by 5% per month for each delay month. In this amendment there are provisions for the fast track procedure defining that parties should give their acceptance of resolution within the time period of 6 months. The timeline for appointment of

[6] sha R. S. , C. S. P., Aruneshwar Jindal Sastry Gupta, Supreme Court On Arbitration And Contracts: An Exhaustive Topical Referencer ... (2015).shank garg, Alternative Dispute Resolution: The Indian Perspective Front Cover (Oxford University Press, 2018 2019).
[7] shashank garg, ADR : The Indian Perspective Front Cover (Oxford University Press, 2018 2019).
[8] IBID

arbitrator is six months and challenging the award has to be within one year. Arbitrator is also empowered to confer high cost on unreasonable adjournment. [9]

The Government of India decided to amend the Arbitration Act 1996 further and introduced the Amendment Bill 2019. The striking feature of this amendment is to do away with the retrospective nature of the 2015 Amendment Act. Section 26 of 2019 Amendment has clarified that any proceeding which has commenced before 2015 Amendment unless the parties otherwise agree, the amendments of 1996 by 2015 will not apply to the cases and any related court proceeding. Furthermore the confidentially provision is also added in section 42A which "The minute that you go to arbitration, it's 100% confidential, so nobody ever hears about it"[10]. It is required for the arbitral institution that they have to maintain the confidentiality of the case except disclosure of award which is necessary for enforcement. This Bill also added section 42B in which arbitrator are not dragged in any unnecessary legal proceeding by the parties in any action taken by arbitrator in good faith for the parties. They are free from this fear of proceeding and exercise their function. The timeline of the proceeding is also become flexible by providing that section 29A would apply only after the completion of proceedings. Section 7 is also replaces the words "furnishes proof that" appearing under section 34(2) (a) of the act. The Supreme Court and the High Court is empowered to appoint arbitrators in the absence or failure of a procedure to appoint an arbitrator. Section 45 of part II of this act is also amended the provision and substitute the words "unless it finds" with the words "unless it prima facie finds". In Section 11 of Arbitration and conciliation amendment bill 2019 High Courts and Supreme Court of India have been empowered to designate specific arbitrator institution for making an appointment of arbitrators.

Research Questions

1. Whether the Arbitration and conciliation Act provides mechanism for effective resolution of disputes in India?
    a. Whether there are barrier to effectively resolved disputes through Arbitration and Conciliation in India?
    b. Whether the current Arbitration & Conciliation Act sufficiently addresses the barriers, if any?

[9] (Lawcommissionofindia.nic.in, 2019) <http://lawcommissionofindia.nic.in/reports/Report246.pdf> accessed on 13 October 2019.
[10] Dr. Anupam Kurlwal, *An Introduction to ADR System*, 2011 P. 76

2. What is the impact of Arbitration and Conciliation Amendment Act 2015?
3. Whether Arbitration and Conciliation bill 2019 is sufficient to achieve the objectives of arbitration and conciliation in India?
4. Whether institutions like Arbitration Council of India proposed in 2019 Bill will be effective in securing speedy resolution?

Aim and objects of the research is to study:

1. To assess the Arbitration and conciliation amendments in providing timely efficient and cost effective resolution of disputes.
2. The legal framework related to Arbitration and Conciliation in India.
3. The International framework related to ADR in general and Arbitration and Conciliation in particular.
4. To identify the role of courts in strengthening the Arbitration.
5. To study the effect of resolution of disputes through Arbitration and conciliation on pendency of cases in Indian Courts.
6. To identify barriers to the implementation and enforcement of effective provisions of Arbitration and Conciliation Amendment Act.

Methodology

The methodology adopted is by and large doctrinal in nature. The research intends to rely mainly upon the data collected from Acts, Bills, decided Cases, official records, Reports, Books, Journal Articles and published or unpublished dissertations etc. The thesis will be descriptive and analytical in presentation. Mode of citation shall be same, as is followed Journal of Indian Law Institute. Uniformity shall be maintained.

Tentative Chapterization

Chapter 1: Context and Methodology of the Study
Chapter 2: Significance and Contribution of ADR mechanisms
Chapter 3: Historical Evolution of Alternative Dispute Resolution mechanisms in India
Chapter 4: Existing Legal Framework on Arbitration in India
Chapter 5: Courts and Arbitration: During and After the Process
Chapter 6: International Framework and Select Foreign Jurisdictions on Arbitration
Chapter 7: Conclusion and Suggestions

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8. (Shodhganga.inflibnet.ac.in,2019)<https://shodhganga.inflibnet.ac.in/bitstream/10603/180576/16/16_chapter%207%20conclusion%20and%20suggestions.pdf> accessed on 13 October 2019
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